Supreme Court, U.S.
FILED

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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

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L. KEITH YOHN, D.D.S.
PETITIONER

VS.

BOARD OF REGENTS, on behalf of
THE UNIVERSITY OF MICHIGAN, et al
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
MICHIGAN COURT OF APPEALS

# PETITION FOR WRIT OF CERTIORARI

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pro se

30 pp

## QUESTIONS PRESENTED

I.

Whether the unilateral and arbitrary reduction in the petitioner's period of employment from 12 to 9 months per fiscal year by the State of Michigan (Board of Regents) produced a privation of the petitioner's protected, vested property rights in the terms of his University Appointment with Tenure was against the University's written tenure policy for part-time tenured professors and Regents' Bylaw Chapter V Sec. 5.08(1). Nevertheless, the privation is in accordance with the Michigan Const 1963, art 10 Sec. 2; Note 38, governed by Michigan Statute, 1980 PA 87; MCL 213.1 et seq.; MSA 8.1 et seq.. The privation is an arbitrary and capricious invasion of the petitioner's property rights without his consent or compensation ?

II.

Whether the petitioner had a meaningful hearing and appellate review to redress the arbitrary and capricious privation of the petitioner's protected, vested property rights in the terms of his University Appointment with Tenure. When the trial judge failed to make conclusions of law as required by Michigan Court Rules 2.504(B)(2) and 2.517(A)(1) to support his decisions and the appellate court failed to review the law of the case. The results being the decisions of the trial judge and opinion of the appellate court radically conflict with the rulings made by the Michigan Court of Appeals, United States Circuit Court of Appeals and the United State Supreme Court. The noncompliance with court rules by the trial judge and failure of the appellate court to review the law of the case are infringements of the petitioner's Fifth and Fourteenth Amendment rights under the United States Constitution ?

## LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

the offices and agents thereof;
PRESIDENT,
James J. Duderstadt, Ph. D.;
PROVOST AND VICE-PRESIDENT
FOR ACADEMIC AFFAIRS,
Robert S. Holbrook, Ph. D.;
DEAN OF THE DENTAL SCHOOL,
William E. Kotowicz, D.D.S.;
DEPARTMENT CHAIRPERSON,
Brien R. Lang, D.D.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the Michigan Court of Appeals appears at Appendix A to the petition and is unpublished.

## JURISDICTION

For cases from **state courts:**

The date on which the highest state court decided my case was September 26, 1995. A copy of that decision appears at Appendix A.

A timely petition for reconsideration was thereafter denied on the following date: August 30, 1996, and a copy of the order denying reconsideration appears at Appendix E.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US CONST, AM V

No person shall be held to answer for a capital, or otherwise infamous crime,unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

US CONST, AM XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MICHIGAN CONSTITUTION (1963)

Article 10 Sec. 2 Eminent domain; compensation

Sec. 2. Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

Note 38. Inverse condemnation

"Inverse condemnation" is a taking of private property for a public purpose without commencement of condemnation proceedings and victim of such a taking is entitled to just compensation for the value of the property taken under this section and U.S.C.A. Const. Amend. 5. Hart v City of Detroit (1982) 331 Nw2d 438, 416 Mich 488, 26 A.L.R. 4th 54.

MICHIGAN STATUTE, 1980 PA 87.

MCL 213.1 et seq.; MSA 8.1 et seq.:

AN ACT to provide procedures for the condemnation, acquisition, or exercise of eminent domain of real or personal property by public agencies or private agencies; to provide for damages; to prescribe remedies; and to repeal certain acts and parts of acts.

THE PEOPLE of the STATE of MICHIGAN enact:

**213.51. Definitions**

Sec. 1. As used in this act:

(a) "Acquire" or "take" means to secure transfer ownership of property to an agency by involuntary expropriation.

(b) "Acquisition" or "taking" means the transfer of ownership of property to an agency by involuntary expropriation.

(c) "Agency" means a public agency or private agency.

(d) " Constructive taking" or "de facto taking" means conduct, other than regularly established judicial proceedings, sufficient to constitute a taking of property within the meaning of section 2 of article 10 of the state constitution of 1963.

(e) "Owner" means a person, fiduciary, partnership, association, corporation, or governmental unit or agency having estate, title, or interest, including beneficial, possessory, and security interest, in a property sought to be condemned.

(f) "Parcel" means an identifiable unit of land, whether physically contiguous or not, having substantially common beneficial ownership, all or part which is being acquired, and treated as separate for valuation purposes.

(g) "Private agency" means a person, partnership, association, corporation, or entity, other than a public agency, authorized by law to condemn property.

(h) "Property" means land, buildings, structures, tenements, hereditaments, easements, tangible and intangible property, and **property rights** whether real, personal, or mixed, including fluid mineral and gas rights.

(i) "Public agency" means a governmental unit, officer, or subdivision authorized by law to condemn property.

MICHIGAN COURT RULE 2.504 DISMISSAL OF ACTIONS

(B) Involuntary Dismissal; Effect

(2) In an action tried without a jury, after the presentation of the plaintiff's evidence the defendant, without waiving the right to offer evidence if the motion is not granted, may move for dismissal on the ground that on the facts and the law the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

MICHIGAN COURT RULE 2.517 FINDINGS BY COURT

(A) Requirements.

(1) In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.

BYLAWS OF THE BOARD OF REGENTS

Chapter V Sec. 5.08(1)

Members of the tenured professorial staff shall be appointed by the Board on recommendation by the appropriate dean or executive committee, and at the University of Michigan-Dearborn or the University of Michigan-Flint by the chancellor, by the President. Unless otherwise provided by specific action by the Board, professors and associate professors shall be appointed on indeterminate tenure. The annual budget as approved by the Board shall be deemed the record of continuance of service for the ensuing year of all persons on the professorial staff.

PRINCIPLES AND PRACTICES GOVERNING TENURE FOR FACULTY MEMBERS WITH DIVIDED OR PARTIAL APPOINTMENTS

Tenure is granted to certain eligible faculty members at the ranks of Associate Professor and Professor by the Regents of the University upon recommendation of the appropriate departmental chair, dean executive committee, and at the university of Michigan-Dearborn or the University of Michigan-Flint by the chancellor, and by the President (Regents' Bylaw 5.08 [4]). Unless other wise specified, a faculty member with tenure is presumed to hold tenure in his or her department, if the school or college is so organized; in the school or college; and in the University of Michigan except

pursuant to the Program Discontinuance Guidelines or Regents' Bylaws 5.08 and 5.09. Faculty rights conferred by the University with respect to tenure are described in Regents' Bylaws 5.08 and 5.09 and the Program Discontinuance Guidelines.

This document describes the principles and practices pertaining to tenure for those members of the faculty who hold regular instructional appointments in more than one unit of the University, or hold part-time appointments. The most general principle is that faculty rights conferred by the University with respect to tenure are indivisible. That is, no faculty member holding tenure may be dismissed from the University of Michigan, demoted, or have his or her appointment reduced below the level at which tenure was awarded except pursuant to the Program Discontinuance Guidelines or Regents' Bylaws 5.08 and 5.09. At the same time, if tenure in a unit is associated with a fractional appointment, the University is not obliged to increase that individual's appointment to full-time in that unit.

Information about a faculty member's tenure status appears on the Notice of Terms and Conditions of Appointment received from the President of the University by each faculty member each year. Year to year fluctuations in actual assignments across different appointing units do not change a unit's responsibility for the faculty member's "with tenure" appointment fraction, but may affect the source of funds used to support that faculty member's salary in any given year. If the faculty member's appointment within a unit awarding tenure is reduced in any given year, that appointing unit shall reestablish the original fractional appointment at which tenure was granted upon request by the faculty member.This understanding is of course modifiable through mutual agreement or pursuant to the Program Discontinuance Guidelines , Regent's Bylaws 5.08, 5.09.

## STATEMENT OF THE CASE

This is a chancery case equitable in nature. The Court can consider the law and facts in this case de novo on the undisputed record. Hays v U of M Regents, 53 Mich App 605,613 (1974).

The subject matter in this case involves the petitioner's protected, vested property rights in the terms of his University Appointment with Tenure and public policy as it relates to a tenured professor in public employment at the University of Michigan. The respondents unilaterally and arbitrarily [without a justifiable reason, cause or societal need] reduced the terms in the petitioner's University Appointment with Tenure resulting in a privation of the petitioner's vested property rights without his consent or compensation

The University of Michigan is a constitutional public educational corporation created by the Michigan Constitution under control of the Board of Regents (the Board). The constitutional status of the University renders it as a fourth arm of state government, thus an instrumentality of the State of Michigan. The Regents are State officials clothed with the power of eminent domain. Pursuant to Bylaw of the Board of Regents [Chapter V Sec. 5.08(1)] the Board is responsible for the employment positions of tenured professors. (Petitioner's exhibit hereafter "PX" # 15)

On May 16, 1975, the Board offered the petitioner, for the purpose of inducing employment, a University Appointment with Tenure. (PX # 2). The agreed upon terms between the Board and the petitioner were: the Board would provide wages, health insurance, 1 month paid vacation and contributions to the petitioner's retirement plan in exchange for 11 months of teaching obligations, clinical duties and consideration provided by the petitioner's sacrifice of substantial bargained for private practice

income and the relinquishment of a substantial portion of his dental business for the appointment. (PX # 4). The petitioner in good faith and fair dealing accepted the Board's offer and began the performance of his duties on September 1, 1975, (12 months of employment). (PX # 14 p 1)

These elements produced, except for cause , an entitlement for a property right to continued employment, Slochower v Board of Education, 350 US 551, 76 S. Ct. 637, 100 L.Ed 692 (1956); Perry v Sindermann, 408 US 593, 92 S.Ct. 2694, 33 L. Ed. 2d 570 (1972); Logan v Zimmerman Brush Co., 455 US 422 p 430, 102 S. Ct. 1149, 71 L.Ed. 2d 265 (1982); and property rights for 12 months of fringe benefits, wages, Sniadach v Family Finance Corp, 395 US 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969); Orloff, M.D. v Cleland, 708 F2d 372 (9th Cir. 1983) and employment, Greene v McElroy, 360 US 474, 79 S. Ct. 1400, 3 L.Ed. 1377 (1959), per fiscal year with the State of Michigan (the Board ): Board of Regents of State Colleges v Roth, 408 US 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

The petitioner provided consideration for the property rights by sacrificing substantial bargained for private practice income and relinquished a substantial portion of his dental business for the appointment. Heaman v E. N. Rowell Co. Inc., 258 NYS 138 (N. Y. 1932); Corbin, A. "Contracts" Sec. 135 (1963).

The understanding between the parties was the petitioner would enjoy the protected, vested property rights in the terms of his University Appointment with Tenure until retirement. Beitzell v Jeffrey, 643 F2d 870 (1st Cir. 1981); Hennessey v National Collegiate Athletic Association, 564 F2d 1136 (5th Cir. 1977); and Black's Law Dictionary.

On March 27, 1987, at a meeting of the Dental school faculty respondent Duderstadt announced his decision to implement a reorganization of the Dental School. (trial transcript hereafter "t" pp 107-09). Pursuant to respondent Duderstadt's plans major changes were made in the employment policies of the Dental School. Such policy changes included reducing the number of months of employment per fiscal year for part-time tenured faculty members. The months of employment per fiscal year for full time tenured faculty members were not reduced or altered in any manner. (Joint exhibit hereafter "JX" # 32).

In July, 1988, at their monthly meeting the Board approved an annual budget for the 1988-89 fiscal year. Included in this budget was an allocation for the petitioner's 12 months of employment for the fiscal year September 1, 1988 through August 31, 1989. (PX # 11-a).

In a business letter dated August 18, 1988, pursuant to Regents' Bylaw 5.08(1), Interim President Robben W. Fleming informed the petitioner of the terms and conditions of his University Appointment with Tenure for the 1988-89 fiscal year. The letter expressly states the period of employment is for 12 months. (PX #s 15 and 14 p 14).

On September 26, 1988, respondent Lang wrote the petitioner a business letter informing the petitioner that his University Appointment with Tenure would be "adjusted" from 12 to 9 months, effective July 1, 1989. ( JX # 48).

In a business letter dated June 13, 1989, respondent Duderstadt informed the petitioner that his university appointment period had been reduced from 12 to 9 months per fiscal year, effective July 1, 1989. This letter reflects a loss of 3 months fringe benefits, wages and employment per fiscal year. (PX # 14 p 15).

The petitioner has made several attempts to negotiate with the respondents the reduction in the terms of his University Appointment with Tenure. (JX #s 12,42,10 and 6). The respondents refused to negotiate the reduction in petitioner's period of employment; stating the University has a policy to reduce tenured professor's appointments, to this day the respondents have not produced the policy. (PX # 21, JX #s 43, 44).

Since the 1988-89 fiscal year, the Board has offered the petitioner 2 additional months of employment per fiscal year. (PX # 55). This fact is evidence that there was still work to be done, the Board needed and still needs the petitioner's services and the Board did not and has not discontinued the Dental School's 12 months of operations. The 2 additional months of employment does not fully restore the petitioner's protected, vested property rights for 12 months of employment per fiscal year.

The fact is:11 does not equal 12 and the respondents still control 25% of the petitioner's property rights.

On December 20, 1989, under the Freedom of Information Act (FOIA) the petitioner received a document titled: Principles and Practices Governing Tenure for Faculty Members with Divided or Partial Appointments (part-time). This is the University's written tenure policy for part-time tenured faculty members. This document expressly states: "that faculty rights conferred by the University with respect to tenure are indivisible pursuant to the Program Discontinuance Guidelines or Regents' Bylaws 5.08 and 5.09. If a faculty member's appointment is reduced in any given year below the level when tenure was granted the appointment shall be reestablished upon request by the faculty member." (PX #s 37,38,39,40,41,42 and 45).

The facts of this matter are: if the State of Michigan (Board) can unilaterally and arbitrarily reduce the petitioner's period of employment from 12 to 9 months per fiscal year, then there will be nothing to prevent the State from reducing the months of employment from 9 to 6, 6 to 3, and 3 to 0 months per fiscal year. This will give the State a powerful weapon to force tenured professors out of their chosen profession and protected, vested property rights in their University Appointments and chip away at academic tenure: the cornerstone of teaching and learning.

The Board had the flexibility to: (1) "grandfather" the petitioner's employment status so he would not be adversely affected by the new employment policies, (2) offer the petitioner a full time university appointment, (3) pay off the employment position as they do for presidents, executive officers, football and basketball coaches, (4) renegotiate the terms of the petitioner's university appointment. The Board refused to renegotiate the terms of the appointment and instead took an authoritarian, arrogant posture in this case, forcing the petitioner to take legal action in this matter.

## LOWER COURT PROCEEDINGS

The petitioner brought this action in the Michigan Court of Claims on July 18, 1991. It was brought by the petitioner as an equitable action seeking the recovery of property rights and just compensation from the Board of Regents, on behalf of The University of Michigan.

The trial judge submitted the case to mediation. The mediation evaluation was held on June 23, 1992. The mediation panel found unanimously in favor of the petitioner

A bench trial was held on August 24, 1992. Before trial the judge entertained the respondents' motion for summary disposition on the petitioner's Count I Fifth amended complaint: "taking" of his property right and contract without compensation claim. The judge concurred with respondents' counsel's assertion that: "it really requires no citation of authority to demonstrate that this is not an inverse condemnation case." The petitioner took exception to counsel's assertion and dialogue began between the judge and the petitioner concerning whether this was or was not a property right case. The petitioner asserted that, "tenure has a property right side to it," this was a property right case and respondents could not take property without compensation. The judge ruled this was not a property right case.

The judge made no conclusions of law and cited no authority to support his decision that this is not a property right case and granted the respondents' motion for summary disposition on the petitioner's Count I Fifth amended complaint. (t pp 7-14). (at Appendix B).

During trial the petitioner placed into evidence the following documents: (1) business letter dated May 16, 1975, to the petitioner from the Vice-President of Academic Affairs informing the petitioner that on this date the Board had conferred tenure to him; (2) business letter dated September 17, 1975, to the petitioner from the Vice-President of Academic Affairs describing the terms and conditions of his University Appointment with Tenure for 12 months of employment per fiscal year; (3) business letter dated June 2, 1969, from the, deceased at the time of trial, Dean of the Dental School to the Vice-President of Academic Affairs describing how the petitioner sacrificed private practice income for his 12 month University Appointment; (4) copy of Regents' Bylaw Chapter V Sec. 5.08(1);

(5) minutes of the Board's monthly July, 1988, meeting showing the Boards approval of a budget for the 1988-89 fiscal year. (6) business letter dated August 18, 1988, to the petitioner from the interim President informing the petitioner that his period of employment for the 1988-89 would be for 12 months, (7) business letter dated June 13, 1989, to the petitioner from the President showing a reduction in the petitioner's wages and employment period from 12 to 9 months per fiscal year. and (8) document titled: Principles and Practices Governing Tenure for Faculty Members with Divided or Partial Appointments. (t pp 64-87).

Respondents' counsel presented over 15 exhibits to the court. Defense counsel did not present one scintilla of evidence to rebut petitioner's evidence. (t pp 109-32).

The record speaks for its self and shows, the petitioner attempted to cite U.S. Supreme Court authorities: Perry v Sindermann, 408 US 593; 92 S. Ct. 2694; 33 L. Ed. 2d 570 (1972) and Board of Regents of State Colleges v Roth, 408 US 564; 92 S. Ct. 2701; 33 L. Ed. 2d 548 (1972) to support his contentions that he had an entitlement to continued employment and protected, vested property rights in the terms of his University Appointment with Tenure. The judge ignored the petitioner's attempts and pursued his rapid-fire questioning of the petitioner. (t p 159 - 60).

At the close of the petitioner's proofs respondents' counsel made a motion for involuntary dismissal and judgment for the respondents pursuant to Michigan Court Rules (MCR) 2.504(b)(2) and MCR 2.517(A)(1). These rules require the judge to make conclusions of law to support his decisions. The judge failed to make conclusions of law to support his decisions: (1) tenure is not a contract, and (2) no contractual relationship exist between the parties. Nevertheless, the judge granted respondents motion by

order dated September 23, 1992. (at Appendix B).

The petitioner took exception to the trial judge's decisions and made motions for an amended order, amended complaint and new trial on October 13, 1992. A hearing on the motions was held on November 10, 1992. After consideration of the motions, supporting brief and argument the judge ruled the motions were without merit and denied the motions by order dated November 10, 1992. The petitioner took exception to the judge's ruling and put on the record that he would appeal the matter. (at Appendix C).

The issues of: (**a**) the terms of the petitioner's University Appointment with Tenure and 12 months of employment (t p 153-4 p 156-57), (**b**) a prima facie case (t p 164 p 167), (**c**) petitioner's considerations for his university appointment (t p 167-68), (**d**) the University's written policy for part-time tenured professors (t pp 162-63), (**e**) Regent' Bylaw 5.08(1), (t pp 154-55, pp 156-57), (**f**) the taking for whim and caprice (t p 157-58), (**g**) the respondents arbitrary and capricious action (t p 166), (**h**) meaning of tenure (t p 155, pp 157-60, p 167), and (**i**) whether this is or is not a property right case and Michigan's 'inverse condemnation doctrine," (t pp 7-14), were all raised in the court of first instance, Michigan Court of Claims.

The petitioner appealed by right; a consolidation of the summary disposition and involuntary dismissal motions and judgment for the respondents to the Michigan Court of Appeals on November 30, 1992. The parties submitted briefs to the court and oral argument was held on May 10, 1995. In questions I and II in petitioner's brief on appeal, the petitioner fully argued and cited case authorities from the Michigan Court of Appeals; Garner v Michigan State University, 185 Mich App 750, 462 NW2d 832 (1990); the United States Sixth Circuit Court of Appeals; Johnson-Taylor v

Gannon, 907 F2d 1577 (6th Cir. 1990); and the United States Supreme Court ; Board of Regents of State Colleges v Roth, 408 US 564 (1972) and Perry v Sindermann, 408 US 593 (1972), supra., to support the petitioner's claims that he had an entitlement to a protected property right to continued employment and vested property rights in the terms of his University Appointment with tenure for 12 months of fringe benefits, wages and employment per fiscal year with the Board. In an unpublished memorandum dated September 26, 1995, the court of appeals panel affirmed the Court of Claims judge's order for reasons stated on the record August 24, 1992, without citing case authority or authorities to support the judge's legally groundless decisions. (at Appendix A).

On October 10, 1995, the petitioner submitted an application for Leave to Appeal to the Michigan Supreme Court and in this application the petitioner asked the Court ,in questions I and II to review the noncompliance of Michigan Court Rules by the trial court and appellate court [specifically MCR 2.517(A)(1)] and the trial judge's legally groundless decisions. By order dated July 16, 1996, the Court denied the petitioner's application for leave to appeal . Senior Justices Levin and Cavanagh, JJ., would grant leave to appeal. (at Appendix D).

On July 22, 1996, the petitioner submitted a motion for reconsideration, asking the Court again to review: the noncompliance of Court Rules by the trial court and the trial judge's legally groundless decisions. By order dated August 30, 1996, the motion for reconsideration of the Court's order of July 16, 1996, was denied. Senior Justices Levin and Cavanagh, JJ., would grant leave to appeal. (at Appendix E).

## REASONS FOR GRANTING THE PETITION

1. This matter involves the invasion of the petitioner's civil rights to possess property. When the State of Michigan (the Board of Regents) unilaterally and arbitrarily, without cause or a justifiable reason, took away the petitioner's protected, vested property rights in the terms of his University Appointment with Tenure without his consent or compensation and against the Court's rule in Logan v Zimmerman Brush Co., 455 US 422; 102 S. Ct. 1148; 71 L. Ed. 2d 265 (1982) the Court said:

> it "remain[s] true that the State's interest in fashioning its own rules of tort is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." Logan, supra at p 433.

2. This case involves public policy as it relates to tenured professors employed in this Nation's public universities. Board of Regents of State Colleges v Roth, 408 US 564; 92 S. Ct. 2701; 33 L.Ed. 2d 548 (1972) and Perry v Sindermann, 408 US 593; 92 S. Ct. 2694, 33 L.Ed. 2d 570 (1972).

3. The judicial proceedings in this case did not conform to Michigan Court Rules. A cause of action is a property right. Therefore, the noncompliance with court rules is an infringement of the petitioner's property rights under the Fifth and Fourteenth Amendments of the United States Constitution. Logan, supra pp 429-30.

## REASONS FOR GRANTING THE PETITION

continued

4. The petitioner is suffering irreparable harm because he has suffered and continues to suffer the loss of the full enjoyment of his protected, vested property rights in the terms of his University Appointment with Tenure.

5. The trial judge's legally groundless decisions and the Michigan Court of Appeals failure to address the law of the case resulted in rulings that radically conflict with this Court's rulings in Board of Regents of State Colleges v Roth, 408 US 564 (1972) and Perry v Sindermann, 408 US 593 (1972), supra. This case is a natural progression of Roth and Sindermann, id..

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

L. Keith Yohn, DDS

L. Keith Yohn, D.D.S.

pro se

Date: September 26, 1996.

**STATE OF MICHIGAN**
**COURT OF APPEALS**

**UNPUBLISHED**
September 26, 1995

L. KEITH YOHN, D.D.S. v BOARD OF REGENTS, on behalf of the UNIVERSITY OF MICHIGAN, et al.

**MEMORANDUM.**

Plaintiff appeals a Court of Claims judgment in favor of defendants. The trial court, prior to a bench trial, granted defendant's motion for summary disposition with respect to plaintiff's inverse condemnation claim. At the subsequent bench trial, the trial court granted involuntary dismissal of plaintiff's remaining claims involving an alleged breach of contract. We affirm.

Our review of the record leads us to conclude that the trial court acted properly in granting involuntary dismissal pursuant to MCR 2.504(B)(2), as plaintiff failed to show any entitlement to relief.

Samuel D. Begola Services, Inc. v Wild Brothers, 210 Mich App 636, 639; 534 NW2d 217 (1995). In order for plaintiff to have established his claims regarding the unlawful taking of his alleged constitutionally protected "property" interest in his employment, and the related allegations of improper use of eminent domain and "bad faith" adjustment in employment, he needed to establish a contractual right to twelve-month employment. We agree with the trial court's finding that plaintiff failed to establish that he had a right to twelve-month employment.

Likewise, we need not consider the propriety of the trial court's grant of summary disposition on plaintiff's inverse condemnation claim. Even assuming arguendo that defendants were not entitled to summary disposition, given plaintiff's proofs presented at trial, plaintiff would have been unable to establish this claim as well. Like the breach of contract claims, this claim would have required plaintiff to prove his entitlement to twelve-month employment. Plaintiff not being able to prove such, this claim also would have been subject to dismissal under MCR 2.504(B)(2). Thus, we need not determine whether the reasoning underlying the dismissal was wrong because the right result was reached and, therefore, plaintiff is not entitled to relief. Glazer v Lamkin, 201 Mich App 432, 437; 506 NW2d 570 (1993).

Additionally, we note that contrary to plaintiff's claim on appeal, the trial court did enter a written order concerning the grant of summary disposition on the inverse condemnation claim. The September 23, 1992 Judgment for Defendants from which plaintiff appeals incorporates the grant of summary disposition, which was discussed on the record on August 24, 1992, by stating that dismissal is "[f]or the reasons stated on the record August 24, 1992".

**Affirmed.**

**Appendix A**

**STATE OF MICHIGAN**
**IN THE COURT OF CLAIMS**

August 24, 1992

L. KEITH YOHN, D.D.S. v BOARD OF REGENTS, on behalf of the UNIVERSITY OF MICHIGAN, et al.

**TRIAL TRANSCRIPT**

**TRIAL JUDGE'S DECISIONS:**

The court in granting involuntary dismissal pursuant to the rule, MCR 2.504(B)(2), must, after the presentation of plaintiff's evidence, determine the facts and render a judgment against the plaintiff or may define the rendered judgment after the close of all the evidence. The court renders judgment in this case against the plaintiff on the basis and makes findings pursuant to MCR 2.507 on the basis that the court does not believe that any contract to hire the plaintiff for a 12-month term throughout the year has been proven is in existence; therefore, no contract being in existence, it would be impossible for the defendant to breach it. Certainly, there is tenure that existed between the parties, but tenure is something other than a contractual relationship for employment on some specified basis unless it's in writing.

So judgment may enter for the defendant. Will you prepare the appropriate order, Mr. Daane, and submit that to the court under the seven-day rule or to Dr. Yohn for his approval?

**STATE OF MICHIGAN**
**IN THE COURT OF CLAIMS**

September 23, 1992

**JUDGMENT FOR DEFENDANTS**

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan, on September 23, 1992.

This matter was tried in open court on August 24, 1992. At the conclusion of plaintiff's proofs, Defendants moved for dismissal pursuant to MCR 2.504(B)(2) on the grounds that plaintiff had shown no right to relief. The Court then stated its findings and conclusions on the record as provided by MCR 2.517(A)(3) and granted Defendants' motion.

For the reasons stated on the record on August 24, 1992, it is hereby ORDERED AND ADJUDGED that plaintiff's Complaint is dismissed with prejudice and that plaintiff shall recover nothing in this cause. Defendants may tax costs pursuant to MCR 2.625 and MCR 2.403(O).

**STATE OF MICHIGAN**
**IN THE COURT OF CLAIMS**

November 10, 1992

L. KEITH YOHN, D.D.S. v BOARD OF REGENTS, on behalf of the UNIVERSITY OF MICHIGAN, et al.

**ORDER DENYING PLAINTIFF'S MOTION TO AMEND ORDER, MOTION FOR NEW TRIAL AND MOTION TO AMEND COMPLAINT.**

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan, on November 10, 1992.

Plaintiff's Motion to Amend Order, Motion for a New Trial and Motion to Amend Complaint dated October 13, 1992 was heard in open court on November 10, 1992. Plaintiff appeared pro se and Defendants by Roderick K. Daane, Esq. Upon consideration of the Plaintiff's Motion, supporting brief and the parties arguments, the Court is of the opinion that the Motion is without merit and accordingly

**IT IS HEREBY ORDERED** that plaintiff's Motion be and the same is hereby denied with prejudice.

APPROVED AS TO FORM; BUT NOT TO SUBSTANCE AND CONTEXT.

## MICHIGAN SUPREME COURT

**ORDER**

Entered: July 16, 1996

L. KEITH YOHN, D.D.S. v BOARD OF REGENTS on behalf of the UNIVERSITY OF MICHIGAN, et al.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Levin and Cavanagh, JJ., would grant leave to appeal.

## MICHIGAN SUPREME COURT

**ORDER**

Entered: August 30, 1996

L. KEITH YOHN, D.D.S. v BOARD OF REGENTS, on behalf of the UNIVERSITY OF MICHIGAN, et al.

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The motion for reconsideration of this Court's order of July 16, 1996 also is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Levin and Cavanagh, JJ,. would grant the motion for reconsideration, and on reconsideration would grant leave to appeal.

(2)

Supreme Court, U.S.
FILED
OCT 29 1996
CLERK

No. 96-524

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

I. KEITH YOHN, D.D.S.,
*Petitioner,*
v.

BOARD OF REGENTS, on behalf of THE UNIVERSITY OF MICHIGAN, *et al.*, the offices and agents thereof; PRESIDENT, JAMES J. DUDERSTADT, PH.D.; PROVOST AND VICE-PRESIDENT FOR ACADEMIC AFFAIRS, ROBERT S. HOLBROOK, PH.D.; DEAN OF THE DENTAL SCHOOL, WILLIAM E. KOTOWICZ, D.D.S.; DEPARTMENT CHAIRPERSON, BRIEN R. LANG, D.D.S.,
*Respondents.*

**On Petition for a writ of Certiorari to the Michigan Court of Appeals**

## RESPONDENTS' BRIEF IN OPPOSITION

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10 pp

## COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

In the absence of a substantial federal question, may this court exercise jurisdiction in a breach of contract case decided by Michigan Courts?

II.

When the asserted error below consists of allegedly erroneous findings by the state court trial judge or his misapplication of the rule of "inverse condemnation" does Supreme Court Rule 10 admonish against *certiorari*?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

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No. 96-524

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L. KEITH YOHN, D.D.S.,

*Petitioner,*

v.

BOARD OF REGENTS, on behalf of THE UNIVERSITY OF MICHIGAN, *et al.*, the offices and agents thereof; PRESIDENT, JAMES J. DUDERSTADT, PH.D.; PROVOST AND VICE-PRESIDENT FOR ACADEMIC AFFAIRS, ROBERT S. HOLBROOK, PH.D.; DEAN OF THE DENTAL SCHOOL, WILLIAM E. KOTOWICZ, D.D.S.; DEPARTMENT CHAIRPERSON, BRIEN R. LANG, D.D.S.,

*Respondents.*

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**On Petition for a writ of Certiorari to the Michigan Court of Appeals**

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## RESPONDENTS' BRIEF IN OPPOSITION

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## CITATIONS TO OPINIONS BELOW

Opinion of Michigan Court of Appeals, September 26, 1995 (Pet. App. A). Decision of Michigan Court of Claims, August 24, 1992, Judgment of Michigan Court of Claims, September 23, 1992 (Pet. App. B). Order of Michigan Court of Claims, November 10, 1992 (Pet. App. C). Order of Michigan Supreme Court, July 16, 1996 (Pet. App. D). Order of Michigan Supreme Court, August 30, 1996 (Pet. App. E).

## CONCISE STATEMENT RE JURISDICTION

Petitioner claims jurisdiction under 28 U.S.C. § 1257 (a). However, this is a state law case and does not present a substantial federal question so the court lacks jurisdiction.

## STATUTES

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States to drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

## STATEMENT OF THE CASE

This Court lacks jurisdiction because the issue is a simple state law breach of contract claim without a substantial federal question.

## ARGUMENT

### I. THIS COURT SHOULD NOT EXERCISE JURISDICTION OVER A STATE LAW ISSUE IN THE ABSENCE OF A SUBSTANTIAL FEDERAL QUESTION.

Professor Moore put it this way.

> "Where there are both federal and non-federal matters in the case, . . . if the state court decided only the non-federal questions or decides both the federal and non-federal questions, the Supreme Court has no jurisdiction to review if the non-federal ground is adequate to support the judgment." (Citations

omitted). Moore's Federal Practice Second Edition, Volume 12, ¶ 511.01.

He also stated:

> "But the interplay is somewhat different between the Courts *certiorari* jurisdiction over state court judgments under 28 U.S.C. § 1257 and the grant or denial of *certiorari* under the circumstances indicated in Rule 10. Under § 1257 the court does not have any *certiorari* jurisdiction unless the state court judgment is final, rendered by the highest court of the state in which a decision could be had, a federal question is duly raised and adjudicated, is substantial, and the judgment does not rest upon an adequate non-federal ground." (Citations omitted). Moore's Federal Practice Second Edition, Volume 13, ¶ 810.07.)

As Petitioner acknowledges, this case was tried in the Michigan Court of Claims which concluded that Petitioner had failed to prove a *prima facie* case for breach of contract against Respondents. The Michigan Court of Appeals affirmed and further observed that Petitioner's so-called "inverse condemnation" claim failed because he had not proved a property right (contract) which could have been taken from him. See Petition, App. A. The Michigan Supreme Court denied leave to appeal and rehearing, and the opinion of the Michigan Court of Appeals is thus final. It is evident that even if Petitioner's inverse condemnation claim raised a federal question, that question is not substantial and the judgment of the Michigan Courts rests upon a completely adequate non-federal ground, i.e., Petitioner's failure to prove breach of contract. Thus the court lacks *certiorari* jurisdiction under 28 U.S.C. § 1257(a).

## II. ALTERNATIVELY, IF THE COURT TAKES JURISDICTION, SUPREME COURT RULE 10 ADMONISHES AGAINST GRANTING *CERTIORARI* UNDER THE CIRCUMSTANCES AT BAR.

Rule 10 says, in pertinent part:

> "A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The grant of *certiorari* would be improvident because Rule 10 describes Petitioner's claims perfectly. Petitioner complains that the trial judge misapplied the rule of inverse condemnation, misapplied Michigan Court Rules and erroneously found that the facts offered by Petitioner at trial did not prove a *prima facie* case for breach of contract. See, e.g., Petition at pp. 13-15.

Moreover, as required by Supreme Court Rule 15.2, Respondents point out numerous misstatements contained in the Petition as follows:

- The document entitled "Principles And Practices Governing Tenure For Faculty Members With Divided Or Partial Appointments" which is quoted at pages 5 and 6 of the Petition was admitted for the very limited purpose of providing that it had been sent to the various deans at the University of Michigan (Trial Trans 92) and that Petitioner had made a Freedom of Information Act request for it (Trial Trans 163). Even if it had been admitted without qualification, however, the document would not prove Petitioner's case because by its terms it applies to dismissals or reductions in rank, i.e., the level of appointment, not to the simple change in work schedule at issue in this case. Furthermore, the record contains no proof that the document was even adopted as university policy, as the trial judge correctly found (Trial Trans 163).

- The Petition contains several references to Petitioner's alleged ". . . sacrifice of substantial bargained for private practice income . . . ." (Petition, pp. 7, 8). The trial record, however is devoid of such proofs.
- Similarly, Petitioner's claim that "the understanding between the parties was the Petitioner would enjoy the protected vested property rights in the terms of his University appointment with tenure until retirement" is unsupported by anything in the record. It was for this reason in part that the trial court held that Petitioner had failed to prove a *prima facie* case for breach of contract.
- Petitioner has failed to mention that he initially brought this case in the Federal District Court for the Eastern District of Michigan (No. 90-CV 72073-DT) under 42 USC § 1983 and that on May 23, 1991 the Honorable Bernard A. Friedman granted summary judgment in favor of Respondents.
- Finally, Respondents do not understand Petitioner's assertion at page 13 of the Petition that "Respondents' counsel presented over 15 exhibits to the court." Although premarked joint exhibits were offered by Petitioner, Respondents presented no exhibits to the trial court; instead the case was decided on Respondents' motion for dismissal at the conclusion of Petitioner's proofs.

## CONCLUSION

The Petition for *certiorari* must be denied.

Respectfully submitted,

RODERICK K. DAANE
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*Attorney for Respondents*

October 29, 1996

Supreme Court, U.S.
FILED
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(3)

No. 96 - 524

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

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L. KEITH YOHN, D.D.S.,
*Petitioner,*

V.

BOARD OF REGENTS, on behalf of
THE UNIVERSITY OF MICHIGAN, et al.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO
MICHIGAN COURT OF APPEALS

# PETITIONER'S REPLY BRIEF

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pro se

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No. 96-524

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**In The**
**SUPREME COURT of the UNITED STATES**
**October Term, 1996**

L. KEITH YOHN, D.D.S.,
*Petitioner,*

v.

BOARD OF REGENTS, on behalf of
THE UNIVERSITY OF MICHIGAN, et al.,
*Respondent*

**On Petition For A Writ of Certiorari To Michigan Court of Appeals**

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# PETITIONER'S REPLY BRIEF

**********

NOW comes the Petitioner, L. Keith Yohn, D.D.S., pro se, and says the Respondents' arguments in their brief in opposition to the Petition for a writ of Certiorari are infirm for the following reasons.

## I. The Court Should Grant The Petition Because The State Courts Decline To Properly Adjudicate The Petitioner's; Taking Of A Contract And Property Rights Without Compensation Claim Involving Public Policy.

The Respondents argue, "... the issue is a simple state law breach of contract claim ...." (Respondents brief p 2). The respondents are misguided because in the area of public employment this Court has held that a public college professor summarily dismissed with 13 other college professors from college appointments held under tenure provisions, *Slochower v Board of Education*, 350 US 551, 76 S.Ct.637, 100 L.Ed. 692 (1956), and a college professor with de facto tenure, *Perry v Sindermann*, 408 US 593, 92 S. Ct. 2694, 33 L. Ed.2d 570 (1972); and college professors and staff members dismissed during the terms of their contracts *Wieman v Updegraff* , 344 US 183, 73 S.Ct. 215, 97 L. Ed. 216 (1952) and a teacher hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment, *Connell v Higginbotham*, 408 US 207, 91 S.Ct.1772, L.Ed. 418 (1971) have a property right to continued employment that is safeguarded by the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.

Thus, to put it as plainly as possible, the United States Supreme Court teaches that a professor in public employment possesses a vested property right to continued employment safeguarded by due process which can be created by an implied promise, a contract, de facto tenure or a written tenure provision. The present case before the Court involves a written tenure provision.

One of the questions before the Court is: What are the dimensions of the Petitioner's property rights ?

There can be no dispute that this is a property right case and Respondents' argument that this is a simple state law breach of contract issue must fail. The Court should grant the Petition for a writ of Certiorari.

## II. The Court Can Exercise Jurisdiction Over This Case Under 28 U. S. C. Sec. 1257(a).

The Respondents argue that this Court lacks jurisdiction under 28 U.S.C. 1257(a). (Respondents brief pp 2-3). This argument must fail for two reasons:

A. The Supreme Court Case Selection Act (Public Law 100 - 352) passed by Congress in 1988, amended the Section 1257 statute. The amendment struck out the old contents and a fresh Section 1257 was enacted. The amendment abolished the, "for want of a substantial federal question" language and gave the Court full discretionary power, with no strings attached, to grant Certiorari to state court cases with important public interest issues.

The authority cited by the Respondents to support their argument, Moore's Federal Practice Second Edition, was last published in 1966, twenty-two (22) years before the 1988 Supreme Court Case Selection Act was passed by Congress. This Act renders Professor Moore's 1966 commentary on Section 1257 invalid. Hence, Professor Moore's commentary is irrelevant for the purpose of this Court's jurisdictional powers.

B. The present case before the Court bristles with Federal civil rights issues under the Fifth, Ninth and Fourteenth Amendments of the United States Constitution.

At issue is the Petitioner's Count I , Fifth amended complaint; "taking of a contract and property rights without compensation" claim. (Petition p 12). Some of the Federal questions involved are: (1) Did the Petitioner receive due process before the privation of his protected, vested property rights in the terms of his University Appointment with Tenure? (2) Has the Petitioner received due process in the state courts ? (3) Can the State of Michigan "take" the Petitioner's vested property rights without "just compensation " ?

This Court held in *Williamson Co. Regional Planning Comm. v Hamilton Bank of Jackson City* , 473 US 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) that litigants in the States of Tennessee and Michigan must first seek compensation under those State's "inverse condemnation doctrine" before pursuing Federal civil rights issues under 42 U.S.C. Sec 1983 claims. The Court said:

> [A] taking claim is not ripe until plaintiff has sought compensation through state procedures. Similarly, lower federal courts have followed suit requiring that a plaintiff first obtain a final decision from the governmental entity that is alleged to have taken property without just compensation and utilize the state procedures for obtaining just compensation before the plaintiff's Section 1983 claim will be considered ripe for adjudication. also see, *Electro - Tech, Inc v H.F. Campbell Co.*, 433 Mich 37, 445 NW2d 61 (Mich 1989); *Bigelow v Michigan Department of Natural Resources*, 970 F2d 154 (6th Cir. 1992).

*Peterman v DNR*, 446 Mich 177 (1994).

The Petitioner has complied with this Court's rule in *Williamson Co. Regional Planning Comm.* supra., by seeking a remedy in Michigan's state courts. The Petitioner presented this same argument to the Michigan Court of Appeals in his Brief on Appeal question V, A. The Petitioner has not received compensation for the privation of his protected, vested property rights because the state courts decline to review the law in the case. Thereby ,putting the Petitioner in a "deep-freeze".

The Court should exercise its supervisory powers under Supreme Court Rule 10 and set aside judgment for the Respondents and order the lower courts to address the law in the case.

For the preceding discussed reasons, this Court can exercise jurisdiction over this case under 28 U. S. C. Sec. 1257(a).

## III. The Court Should Grant The Petition Because The Section Of Rule 10 Quoted By The Respondents Does Not Preclude The Court From Granting Certiorari.

The Respondents argue that the; "Petitioner complains that the trail judge misapplied the rule of inverse condemnation, misapplied Michigan Court Rules ...." (Respondents brief p 4).

The Petitioner shows the Court that the Petitioner complains of the trial judge's **noncompliance** with court rules and the **failure** of the appellate court to review the law in the case. (Petition pp i, 13-15).

In a motion for summary disposition, Michigan Court Rule 2.116(10) states: "Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

When the Court reviews the transcript of the proceedings for Respondents' summary disposition motion held on August 24, 1992, (t pp 7-14). The Court will find that the trial judge made no findings of material fact. The Respondents did not offer the court expert testimony, learned treatise or any other law to support their motion.

The Petitioner offered the court *Petition of Mackey, State Highway Commission v Flanders,* 5 Mich App 572 (1967); *Delaval v United States,* 284 US 61 (1931); *Electro - Tech v H. F. Campbell Co.,* 433 Mich 57 (1989) supra.; *General Motors v United States,* 323 US 373 (1945) to rebut the Respondents" motion.

How can the trial judge misapply the Petitioner's inverse condemnation doctrine theory when the Respondents offered the court no law to misapply the doctrine on ?

Thus, Supreme Court Rule 10 does not preclude the Court from granting the Petition for a writ of Certiorari.

## IV. The Court Should Grant The Petition Because The Respondents Are Not Being Truthful In Pointing Out Misstatements In The Petition Under Supreme Court Rule 15.2 .

The Respondents state; "Moreover, as required by Supreme Court Rule 15.2, Respondents point out numerous misstatements contained in the Petition as follows:" (Respondents brief p 4).

The Respondents cite only five (5) alleged misstatements in the Petition. (Respondents brief pp 4-5). The Petitioner shows the Court that the Respondents are duping the Court, i.e. The Respondents state: "... Respondents presented no exhibits to the trial court...." (Respondents brief p 5). The trial transcript shows the Respondents placed into evidence Defendants' Exhibits #s 1,3,5,11,13,14,15, 16,17,20,24,29,30,46 and 65.

This example shows the Court that the Respondents are not being forthright and straightforward with the Court. Thereby, the Respondents loose their credibility.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

L. Keith Yohn, DDS

L. Keith Yohn, D.D.S.

pro se

Date: November 7, 1996.